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No. 94-571

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

R.J. REYNOLDS TOBACCO COMPANY, *et al.*,
Petitioners,
v.
JANET C. MANGINI,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of California

REPLY BRIEF FOR PETITIONERS

Of Counsel:
H. JOSEPH ESCHER III
HOWARD, RICE, NEMEROVSKI, CANADY, ROBERTSON, FALK & RABKIN
Three Embarcadero Center
7th Floor
San Francisco, CA 94111
(415) 434-1600

JOHN L. STRAUCH
(Counsel of Record)
ROBERT C. WEBER
JONES, DAY, REAVIS & POGUE
North Point
901 Lakeside Avenue
Cleveland, OH 44114
(216) 586-3939

BARBARA MCDOWELL
GREGORY G. KATSAS
JONES, DAY, REAVIS & POGUE
1450 G Street, N.W.
Washington, D.C. 20005
(202) 879-3939
Counsel for Petitioners

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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REPLY BRIEF FOR PETITIONERS

The petition for certiorari identifies three distinct reasons why this Court should review the California Supreme Court's decision that Section 5(b) of the Federal Cigarette Labeling and Advertising Act ("Labeling Act") does not preempt state-law claims to enjoin cigarette advertising allegedly targeted at minors. Respondent offers only the most perfunctory discussion of these grounds for review. On two of them, respondent rests on incorrect assertions about *Cipollone v. Liggett Group, Inc.*, 112 S. Ct. 2608 (1992). And on the third, respondent all but concedes the conflict between the California Supreme Court decision and *Vango Media, Inc. v. City of New York*, 34 F.3d 68 (2d Cir. 1994). Respondent is also mistaken in her principal arguments that this Court lacks jurisdiction and that the decision below is correct on the merits.

1. Respondent is wrong to contend that the decision below is not "final" within the meaning of 28 U.S.C. § 1257. Opp. 11-12. The California Supreme Court has "finally decided" the question whether Section 5(b) preempts state-law claims for unfair targeting of minors, and a reversal of its decision "would be preclusive of any further litigation." *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 482-83 (1975). This Court has not hesitated to assume jurisdiction in cases where, as here, a state supreme court has rejected a claim of federal preemption and then remanded for further proceedings under state law. *See, e.g., Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 178-80 (1988); *Belknap, Inc. v. Hale*, 463 U.S. 491, 497-98 n.5 (1983); *Construction Laborers v. Curry*, 371 U.S. 542, 543-50 (1963). *See also Mitchell v. Forsyth*, 472 U.S. 511, 525 n.8 (1985) ("[S]tate-court decisions rejecting a party's federal-law claim that he is not subject to suit before a particular tribunal are 'final' for purposes of our certiorari jurisdiction under 28 U.S.C. § 1257.").

Despite this authority, respondent asserts that the California Supreme Court decision will not " 'seriously erode federal policy,' " and thus falls outside this Court's jurisdiction. Opp. 11 (quoting *Cox Broadcasting*, 420 U.S. at 483). But by denying preemptive effect to Section 5(b), the decision below would supplant uniform federal regulation of cigarette advertising with "diverse, nonuniform, and confusing" state and local regulation—the very problem that the Labeling Act expressly sought to avoid. 15 U.S.C. § 1331(2)(B). Respondent does not even suggest that the unfair targeting claims approved below would rest on uniform standards nationwide. As we have explained at length, they clearly would not. Pet. 11-14.

Recent events confirm the rapidly mounting threat to Congress's stated interest in uniform federal regulation of cigarette advertising. Within the past year alone, at

least seven jurisdictions have seen attempts to prohibit or enjoin cigarette advertising allegedly targeted at minors. *See* Pet. App. 1a-21a (California); *Moore ex rel. Mississippi v. American Tobacco Co.*, No. 94-1429 (Jackson Co. Chancery Court) (Mississippi); Colford, *Tobacco Marketers Burned by State Plans*, Advertising Age 48 (March 7, 1994) (Vermont); *Sparks v. R.J. Reynolds Tobacco Co.*, No. C94-783C (W.D. Wash.) (Washington); *McGraw ex rel. West Virginia v. American Tobacco Co.*, No. 94-1707 (Kahawha Co. Circuit Court) (West Virginia); *Penn Advertising v. City of Baltimore*, 1994 U.S. Dist. LEXIS 13120 (D. Md. Aug. 11, 1994) (Baltimore), appeal pending (4th Cir. No. 94-2141); Teinowitz & Jensen, *Colorado City May Expel Joe Camel*, Advertising Age 46 (April 11, 1994) (Snowmass, Colorado). These efforts are part of an ongoing attack on the tobacco industry and its advertising currently being waged in many jurisdictions by state attorneys general,[1] private attorneys general,[2] state and local lawmakers,[3] and plaintiffs' personal injury lawyers.[4]

Unless the California Supreme Court decision is reversed, the attacks on cigarette advertising can be expected to multiply. Indeed, respondent herself contends that the decision approves targeting claims "in contexts

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[1] *See, e.g., Moore, supra; McGraw, supra; Humphrey ex rel. Minnesota v. Philip Morris Inc.*, No. C1-94-8565 (Ramsey County, Minnesota District Court).

[2] *See, e.g.*, Pet. App. 1a-21a; *Sparks, supra.*

[3] *See, e.g., Vango Media, Inc. v. City of New York*, 34 F.3d 68 (2d Cir. 1994); *Penn Advertising, supra;* Colford, *supra;* Teinowitz & Jensen, *supra.*

[4] *See, e.g., Castano v. American Tobacco Co.*, 1994 U.S. Dist. LEXIS 13438 (E.D. La. Sept. 22, 1994) (putative class action on behalf of "tens of millions" of past and present smokers); *Engle v. R.J. Reynolds Tobacco Co.*, No. 94-08273-CA(20) (Dade County, Florida Circuit Court) (putative class action on behalf of "millions" of smokers).

other than smoking by minors." Opp. 13. She argues that jurisdictions prohibiting smoking in hospitals, restaurants, theaters or government buildings also can prohibit advertising that might encourage such smoking (presumably, for example, by depicting doctors, diners, moviegoers or bureaucrats smoking). Opp. 14. It is difficult to imagine a more serious erosion of the federal policy, which Congress has enacted into law, against "diverse, nonuniform, and confusing" state and local regulation of cigarette advertising.

2. Rather than addressing the three specific grounds for review raised in the petition for certiorari, respondent complains that the petition "attempts to shift focus away" from what she perceives as "the real issue in this case." Opp. 13. Respondent's own attempts to divert attention from the arguments raised in the petition, however, rest on misreadings of both *Cipollone* and the California Supreme Court opinion.

A. We have explained at length why this Court should review the California Supreme Court's decision to apply only a facial preemption analysis to unfair targeting claims challenged under Section 5(b). Pet. 8-14. In *Cipollone* itself, five Justices stressed that using facial review to evaluate fraud claims is inconsistent with using as-applied review to evaluate failure to warn claims (112 S. Ct. at 2631 (Blackmun, J.); *id.* at 2636 (Scalia, J.)); two Justices urged using as-applied review for all claims (*id.* at 2636-37); and four Justices, while reviewing fraud claims only facially, did so because those claims, unlike respondent's, rest on a "single, uniform standard" nationwide (112 S. Ct. at 2624 (plurality opinion)).

Respondent attempts to reconcile the California Supreme Court decision with *Cipollone* by misconstruing this Court's decision in three important ways. First, respondent denies that the plurality "engaged in merely a 'facial' analysis" of the fraud claims. Opp. 16. But the plurality explicitly refused to "analyze fraud claims at

the lowest level of generality" (112 S. Ct. at 2624 n.27 (plurality opinion)), rejecting Justice Scalia's proposal to determine whether such claims are "based on smoking and health" in their "proximate application" (*id.* at 2636 (Scalia, J.)).[5] Second, respondent denies that the plurality limited its facial approach to claims involving a "single, uniform standard." Opp. 17 n.9. But the plurality explicitly stated that this approach "is appropriate" because fraud claims, unlike failure to warn claims, "rely on only a single, uniform standard: falsity." 112 S. Ct. at 2624 (plurality opinion). Third, respondent contends that the plurality distinguished fraud claims on the ground that they would merely prohibit certain advertising, without involving the state "in dictating the specific content of cigarette advertising." Opp. 17. Apart from finding no support in the plurality opinion, that distinction is flatly inconsistent with Section 5(b) itself, which preempts not only state-imposed "requirement[s]" for cigarette advertising, but state-imposed "prohibition[s]" as well.[6]

In applying only facial scrutiny to determine whether claims of unfair targeting are "based on smoking and health," the California Supreme Court decision represents a significant departure from *Cipollone*, where two Justices embraced as-applied review for all claims challenged

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[5] Respondent also denies that the California Supreme Court "engaged in merely a 'facial' analysis" of her unfair targeting claim. Opp. 16. That court, however, found "dispositive" the facial analysis of fraud claims advanced by the *Cipollone* plurality. Pet. App. 13a. Indeed, the court acknowledged that respondent's claims were health-based as applied in this case. Pet. App. 15a (noting "the health concerns that fuel this lawsuit").

[6] Indeed, *Cipollone* held that Section 5(b) preempts fraud claims "predicated on a state-law prohibition against statements in advertising and promotional materials that tend to minimize the health hazards associated with smoking." 112 S. Ct. at 2623 (plurality opinion). Characterizing such a *"prohibition"* as "merely the converse of a state law *requirement*" to provide warnings, the plurality stressed that Section 5(b) "pre-empts both requirements and prohibitions." *Id.* (emphases in original).

under Section 5(b), 112 S. Ct. at 2636-37 (Scalia, J.), and four Justices embraced as-applied review for claims, such as failure to warn and unfair targeting, that do not rest on a "single, uniform standard," 112 S. Ct. at 2623-24 (plurality opinion). Respondent provides no support for her one-sentence assertion that unfair targeting claims "invok[e] a standard no less uniform than the fraud claims approved in *Cipollone*." Opp. 18 n.9. As we have explained in detail, respondent is clearly mistaken. Pet. 11-14.

B. Respondent makes no attempt to defend the California Supreme Court's counterintuitive conclusion that the legal predicate of her unfair targeting claim, California Penal Code Section 308, which prohibits the sale of cigarettes to minors, is not "based on smoking and health" for federal preemption purposes. Nor does respondent attempt to reconcile the California Supreme Court's analysis on this point with *Perez v. Campbell*, 402 U.S. 637 (1971), *Gade v. National Solid Wastes Management Ass'n*, 112 S. Ct. 2374 (1992), or *Vango Media, Inc. v. City of New York*, 34 F.3d 68 (2d Cir. 1994). These cases establish that a state statute is preempted if it has any purpose or effect forbidden by federal law, even if the legislature has articulated, or was motivated by, a permissible purpose as well. Pet. 15-17. By contrast, the California Supreme Court held that Section 308, despite its undisputed public health purpose (Pet. 17-19), is not "based on smoking and health" because its distant predecessor might have been enacted to serve an additional interest in public morality. Pet. App. 15a.

Respondent attempts to dismiss as "irrelevant" the "fact," which she does not seriously dispute, that Section 308 was enacted or amended "in part because of concerns with the health of minors." Opp. 13. *See also id.* ("[T]he controlling question is *not* whether [Section 308] was enacted for health-related reasons."). The California Supreme Court, however, rejected respondent's view that tar-

geting claims are not preempted even if based on underlying tobacco restrictions that are themselves health-based. The California Court of Appeal had embraced this position, holding that targeting claims could arise out of tobacco restrictions that are health-based on their face. Pet. App. 34a-35a (citing provisions from California Health & Safety Code § 25967). The California Supreme Court, however, "did not rely on those provisions in finding no preemption, but on Penal Code section 308," which it proceeded to determine was not health-based. Pet. App. 15a. Respondent's argument notwithstanding, the decision below plainly rests on a determination that Section 308 is not "based on smoking and health."

Ignoring *Perez* and *Gade* entirely, respondent also attempts to distinguish *Vango Media* because that case involved an ordinance "requiring the display" of certain anti-smoking messages, whereas the " 'prohibitio[n]' " against targeting does not " 'require Reynolds to adopt any particular label or advertisement.' " Opp. 18 (quoting Pet. App. 14a). Once again, respondent forgets that Section 5(b) by its terms encompasses health-based "prohibition[s]" as well as health-based "requirement[s]." [7]

C. Finally, respondent does not seriously challenge our contention that review is warranted to assess the conflict between the California Supreme Court decision and *American Airlines, Inc. v. Wolens*, 589 N.E.2d 533 (Ill.), *vacated*, 113 S. Ct. 32 (1992), *reinstated*, 626 N.E.2d 205 (Ill. 1993), *cert. granted*, 114 S. Ct. 1396 (1994). *Wolens*, as we have explained, addresses the question whether assertedly "general" state statutes should be ana-

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[7] In any event, the ordinance in *Vango Media* could, as a practical matter, operate as a "prohibition." That ordinance requires certain advertisers to display, without compensation and at their own expense, one anti-smoking message for every four cigarette advertisements. *See* 34 F.3d at 70. Faced with this substantial economic disincentive, covered advertisers might simply give up cigarette advertising entirely.

lyzed any differently, for express preemption purposes, depending on whether damages or injunctive claims are at issue. Pet. 19-21. Respondent briefly asserts that *Cipollone* did not distinguish between injunctive and damages claims. Opp. 15. *Cipollone* involved only damages claims, however, and the Court simply had no occasion to address the application of Section 5(b) to injunctive claims.

3. Respondent devotes most of her opposition to arguing that the decision below is correct on the merits. She reasons that if a state restricts particular sales or uses of cigarettes, as California has done with respect to minors, then it may also prohibit advertising that might encourage the restricted sales or uses. Opp. 6-9, 12-15.

To begin with, respondent's position makes little sense as a conceptual matter. An advertising prohibition that is imposed to help enforce a specific sales restriction surely advances the same purpose as that sales restriction. Thus, if respondent's unfair targeting claim is based on Section 308 (as the California Supreme Court has held), and if Section 308 is "based on smoking and health" (as respondent all but concedes), then the targeting claim likewise must be "based on smoking and health."

Moreover, respondent's position would entirely eviscerate the federal statutory scheme. By its terms, Section 5(b) preempts *all* health-based restrictions on cigarette advertising, but *no* health-based restrictions on the sale or use of cigarettes.[8] Yet under respondent's theory, a state or municipality, acting upon health-based motives, could impose any cigarette advertising restrictions that it desired, as long as it first imposed an underlying sales or

[8] Section 5(b) provides:

> No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter.

use restriction. A state could always accomplish in two steps what it could not do in one. Needless to say, respondent fails to explain how this startling result is consistent with either the specific text of Section 5(b), which provides that "[n]o" health-based advertising restrictions are permissible, or the underlying policy of the Labeling Act, which seeks to prevent "diverse, nonuniform, and confusing" state regulation of cigarette advertising.[9]

4. Finally, the petition should be held pending resolution of *Freightliner Corp. v. Myrick*, No. 94-286, 63 U.S.L.W. 3291 (U.S. Oct. 7, 1994) (granting certiorari). *Freightliner* presents the question whether courts may find implied preemption, based on an actual conflict between state and federal law, if the federal statute at issue contains an express preemption provision. Both the Eleventh Circuit in *Freightliner* and the California Supreme Court in this case construed *Cipollone* to foreclose the possibility of impled conflict preemption under these circumstances. *See Myrick v. Fruehauf Corp.*, 13 F.3d 1516, 1522 (11th Cir. 1994) ("[W]hen there is an express pre-emption provision we should not consider implied pre-emption"); Pet. App. 10a (refusing to consider implied preemption "[b]ecause Congress enacted an express preemption provision"). If *Freightliner* should modify that understanding

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[9] Through her frequent citation of aphorisms, *e.g.*, Opp. 6 ("You cannot encourage someone to violate the law."), respondent voices apparent disapproval of Congress's choice to preempt health-based advertising restrictions, but not sales or use restrictions. In fact, however, that policy judgment is perfectly sensible. A cigarette retailer can feasibly obey local sales restrictions in any state or municipality where it chooses to do business. On the other hand, at least if it wishes to advertise through widely circulated publications, a cigarette manufacturer cannot easily tailor its advertisements to take account of variations in the laws of every jurisdiction where the advertisements might be read. Thus, to protect the national economy where necessary, and to preserve local authority where possible, Congress chose to preempt only health-based state regulation of cigarette "advertising or promotion."

of *Cipollone*, then this case should be remanded for reconsideration.[10]

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Of Counsel:

H. JOSEPH ESCHER III
HOWARD, RICE, NEMEROVSKI, CANADY, ROBERTSON, FALK & RABKIN
Three Embarcadero Center
7th Floor
San Francisco, CA 94111
(415) 434-1600

JOHN L. STRAUCH
(Counsel of Record)
ROBERT C. WEBER
JONES, DAY, REAVIS & POGUE
North Point
901 Lakeside Avenue
Cleveland, OH 44114
(216) 586-3939

BARBARA MCDOWELL
GREGORY G. KATSAS
JONES, DAY, REAVIS & POGUE
1450 G Street, N.W.
Washington, D.C. 20005
(202) 879-3939
Counsel for Petitioners

November 16, 1994

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[10] If available, implied preemption analysis would almost certainly encompass the targeting claim at issue in this case. *See, e.g., Cipollone v. Liggett Group, Inc.*, 789 F.2d 181, 186-88 (3d Cir. 1986) (*"Cipollone I"*) (Labeling Act impliedly preempts all claims challenging "the propriety of a party's actions with respect to the advertising or promotion of cigarettes"), *cert. denied*, 484 U.S. 976 (1987); *Roysdon v. R.J. Reynolds Tobacco Co.*, 849 F.2d 230, 234-35 (6th Cir. 1988) (following *Cipollone I*); *Stephen v. American Brands, Inc.*, 825 F.2d 312, 313 (11th Cir. 1987) (same).